STATEMENT OF DAVID A. GALT

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BEFORE THE MONTANA BOARD OF ENVIRONMENTAL REVIEW AND THE MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

HEARINGS ON NUMERIC NUTRIENT STANDARDS AND THE PROPOSED ADOPTION OF RULES AND CIRCULARS PERTAINING TO THE STANDARDS

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Good morning. My name is David A. Galt. I serve as the Executive Director of the Montana Petroleum Association (MPA). This is my 9th year in this role for MPA. In this position, I represent the interests of the oil and gas industry before the executive and legislative branches of the state and federal governments. I appreciate the opportunity to share the views of MPA with the Board on the proposed rules pending before the Board, the companion rule package under consideration by officials in the Department of Environmental Quality (DEQ), the draft circulars (DEQ-12A & 12B) published by DEQ, and the implementation guidance document posted on DEQ's website. These five documents are interrelated. Although you are only being asked to promulgate one of the rule packages, which incorporates one of the two circulars, the content of all of the documents is relevant to your inquiry on whether to act.

I. General Background

I have served as a member of the Nutrient Working Group (NWG) since its inception. Beyond regular participation in NWG meetings, I submitted two letters on behalf of MPA to DEQ - - one in 2012 and one in late 2013 - - in response to earlier drafts of the documents pertinent to this rulemaking.

I agree with the DEQ leadership's comments regarding the usefulness of the NWG as a forum to discuss the issues in the rule packages under consideration by the Board and DEQ. And I can say that MPA has had a productive dialogue with DEQ officials on a number of issues of concern to the members of the association. There are significant issues on which we could not reach agreement with the Department. MPA appreciates the opportunity to have this final opportunity to attempt to persuade state policymakers.

I should note at the outset the trepidation many in the regulated community have with respect to this rulemaking. We simply do not know whether potential new employers will be deterred from starting a business in Montana as a result of these standards. We do know that it will be very difficult to meet the end-of-pipe standards required for a permittee to receive a general variance. Whether some existing businesses with discharge permits will find it impossible to continue to operate following implementation of the new numeric standards is also unclear. We do know one thing: we are the guinea pigs in this experiment. Montana is among a small number of states which have studied and moved to adopt numeric nutrient standards for

rivers and streams. Six months ago, a federal district court ruled on an advocacy group's claim that EPA failed to act to adopt numeric nutrient criteria for all fifty states and the District of Columbia. Gulf Restoration Network v. Jackson, 43 ELR 20218 (E.D. La. 2013)(Sept. 20, 2013). In describing the context of the case, the court noted:

> Plaintiffs point out that the states in the Mississippi River Basin have no numeric water quality standards for phosphorous in rivers or streams or for nitrogen in any waters. And most states do not attempt to limit nitrogen and phosphorous discharges in NPDES permits.

Id. at 2. In addition, at present, **none** of our neighbors have adopted numeric nutrient standards. *See* Exhibit 1. These states, among many others, have retained narrative standards for nutrients because they remain legally viable under federal law. 40 C.F.R. § 130.7(c)(1). The questions regarding impacts are not answerable, but it is uncontested that we will have numeric standards when other states will not.

MPA supported the effort in the 2011 Legislature to create authority for the Department to grant variances for point source dischargers of nitrogen and phosphorous limits in numeric nutrient standards which cannot be met given existing technology. As reflected in the documents developed by DEQ, this approach ensures gradual progress on reducing nutrients from point source dischargers, creates additional time for new, cost-effective technologies to emerge for use by point source dischargers, and allows DEQ to focus on the means to reduce discharges from non-point sources of nitrogen and phosphorous.[1] Without the authority for the Department to authorize variances over the next twenty years, MPA would have urged the Legislature to abandon the pursuit of numeric nutrient standards. If associations like MPA conclude that companies are avoiding Montana or leaving the state as a result of these standards, we will be prompt in encouraging a reversal of counterproductive provisions of law.

II. Comments on Draft Rules, Circulars, and Guidance

MPA wishes to comment on both proposed rule packages, DEQ-12A, DEQ-12B, and the Basic Numeric Nutrient Standards Implementation Guidance ("implementation guidance"). Let me first turn to our comments on the rule package under consideration by the BER. I will then address issues of note in the rule package to be considered by the Department. I will share MPA's views on the both parts of DEQ-12 before concluding with comments on the draft implementation guidance.

A. Comments on the BER Rule package designed to establish numeric nutrient standards.

[1] DEQ's approach to reducing discharges from non-point sources is quite distinguishable from the command and control model utilized with municipalities and industrial permittees. In an annual report describing the status of the efforts to reduce nutrients attributable to non-point sources, the State noted, "Montana continues to demonstrate that the Nonpoint Source Management Program is committed to and capable of addressing nonpoint source pollution in Montana and that a voluntary, incentive-based approach works well in this state." State of Montana, 2013 Annual Report, Nonpoint Source Management Program, p. 18.

MPA has multiple observations on the rule under consideration by the Board.

1. ***Inadequate basis for quantitative standard***

First, in paragraph 4 of Section 3, the Department has noted that it determined the "nuisance threshold" for algae by polling "citizens and river and stream users." MPA does not take issue with the sampling methodology, but questions whether this is an appropriate standard to determine improvement of a beneficial use.

2. ***Misstatements regarding legislative purpose and scope of impact***

In the final paragraph in Section 3, DEQ has stated that, "[nutrient] concentrations are below the limits of current wastewater treatment technology." MPA believes that this statement misstates the legislative intent behind Senate Bill 367. First, substantial and widespread economic impacts would result if Montana law required immediate compliance with numeric nutrients standards because current cost-effective wastewater treatment technology would not allow permittees to meet the numeric concentrations for nitrogen and phosphorous imposed by the new standards. We believe that this is a more accurate statement of the reason for the statute than what is reflected in DEQ's draft.

In describing the scope of this problem, DEQ's draft refers to the inability of permittees to meet the numeric concentrations for nitrogen and phosphorous imposed by the new standards as a problem which would arise "in many cases". The use of "many" is inappropriate in this context. Many could be used to define a quantity in excess of a few. It is clear from the action of the Legislature and the plain language of the bill that "most" or "virtually all" should be insert in the place of "many" in the third sentence of the first paragraph of the section describing the reason for the adoption of the draft rule.

3. ***Inadequacy of the Non-Severability Clause***

On page 7, the Department proposes to add a section 2 to Admin. R. Mont. § 17.30.619, as a non-severability clause. MPA has worked closely with the Department on the non-severability clause and appreciates its work to include it in the proposed rule. Its stated reason for inclusion of this passage in Admin. R. Mont. § 17.30.619 reflects legislative intent and the discussions of the purpose of a non-severability clause in NWG meetings. Nonetheless, MPA asks the Board to modify the draft language.

In our discussions with DEQ, MPA noted that the general variance provision internalized in the rule to be promulgated by DEQ and amplified in DEQ-12B will be of no effect if, after promulgation of the rule, EPA disallows a permit with a general variance for the reason that DEQ allowed the permittee to deviate from the numeric nutrients standards based upon the application of a general variance. The essence of this argument is this: the Legislature, without opposition from EPA, used mandatory language in Mont. Code Ann. § 75-5-313(5)(b) to require DEQ to incorporate a general variance in permits if the permit applicant meets certain conditions. If EPA, in turn, refuses to allow a permit with a general variance to take effect as a result of the inclusion of the variance, the intent of the statute has been nullified with respect to the permittee. In such a circumstance, the rules should not continue to bind permittees.

Therefore, MPA asks the Board to amend the language employed by DEQ in the rule as noted in the italicized language as follows:

> If (1) a court of competent jurisdiction declares 75-5-313, MCA, or any portion of that statute invalid, (2) the United States Environmental Protection Agency disapproves 75-5-313, MCA, or any portion of that statute, under 30 CFR 131.21, or if rules adopted pursuant to 75-5-313(6) or (7), MCA, expire and general variances are not available, *or (3) after the date of the promulgation of this rule, the United States environmental protection agency nullifies or otherwise disallows a permit with a general variance issued by the Department based upon the Department's inclusion of a general variance in the permit*, then (1)(e) and all references to DEQ-12A, base numeric nutrient standards and nutrient standards variances in ARM 17.30.201, 17.30.507, 17.30.516, 17.30.602, 17.30.622 through 17.30.629, 17.30.635, 17.30.702, and 17.30.715 are void, and the narrative water quality standards contained in ARM 17.30.637 are the standards for total nitrogen and total phosphorus in surface water, except for the Clark Fork River, for which the standards are the numeric standards in ARM 17.30.631.

Without the addition of this language to the rule, the rule will remain in force if EPA rejects a permit with a general variance for the permittee because EPA does not believe the permittee is entitled to a general variance.

4. ***Inaccurate Statement on DEQ's Authority on Variances***

On pages 10 and 11, in each section which describes the rationale for amending the rule, DEQ has explained that the new language is required, in part, to "incorporate the nutrient standards variance limits." MPA does not believe that the draft language is accurate. MPA recommends that the Board modify the language in all three sections to strike "nutrient standards variance limits" and replace it with "the Department's authority to grant variances from the numeric standards for permittees."

B. Comments on the department rule proposed for adoption by DEQ pertaining to nutrient standard variances.

MPA has three observations to make with respect to the proposed rule under consideration by DEQ, which it views as misstatements regarding the plain language of the statute on variances.

First, DEQ asserts that in many cases nutrient concentrations are "below the limits of current wastewater treatment technology". MPA believes that this statement misstates the legislative intent behind Senate Bill 367. First, substantial and widespread economic impacts would result if Montana law required immediate compliance with numeric nutrient standards because current wastewater treatment technology would not allow permittees to meet the

numeric concentrations for nitrogen and phosphorous imposed by the new standards. We believe that this is a more accurate statement of the reason than what is reflected by DEQ's draft.

In describing the scope of this problem, DEQ's draft refers to the inability of permittees to meet the numeric concentrations for nitrogen and phosphorous imposed by the new standards as a problem which would arise "in many cases". The use of "many" is inappropriate in this context. Many could be used to define a quantity in excess of a few. It is clear from the action of the Legislature and the plain language of the bill that "most" or "virtually all" should be insert in the place of "many" in the third sentence of the first paragraph of the section describing the reason for the adoption of the draft rule.

Another passage in the first paragraph of the section describing the reason for adoption of the rule does not reflect the language of the legislation authorizing general variances. DEQ has written that the "statute allows dischargers to be granted variances from base numeric nutrient standards in those cases where meeting the standards today would be an unreasonable economic burden or technologically infeasible." This should be rewritten to reflect that "the statute requires DEQ to grant general variances from base numeric nutrient standards in those case where meeting the standards today would be an unreasonable economic burden or technologically infeasible and the permittee meets the end-of-pipe treatment requirements in DEQ-12B."

C. Comments on the Draft Circular DEQ-12

In DEQ 12-A, the language in endnote 4 ("as an annual average, not to be exceeded more than once in any three year period, on average") is unclear. What does once in any three year period, on average mean? The lack of clarity makes the compliance requirements for the numeric nutrient standards in Table 12A-1 vague and difficult for permittees to meet.

In DEQ 12-B, the definition of "Monthly Average" in Section 1.1 is confusing. The period in which the base numeric nutrient standards apply is generally July 1 to September 30. If this definition is to be applied to permit compliance then it seems that it should reference the sum of the measurements for a parameter divided by the number of samples during the reporting period.

Although MPA advised DEQ in a July 18, 2012 letter that the statute refers to a monthly average, not a long-term average as utilized in the early drafts of DEQ-12B, the Department did not include the current language in a draft of the circular ever discussed by the NWG. As a result, the definition of monthly average in the current version of DEQ-12B has not been debated by NWG members. While the new definition in Section 1.1 is an improvement, we believe the following is preferable:

Monthly average means the sum of the measurements for a parameter divided by the number of samples during the reporting period, which is a thirty day period between July 1st and September 30th in a calendar year.

D. The Implementation Guidance Document

One can read the proposed rules and DEQ-12 without any knowledge that the Department has published guidance to implement the rules and the circular. As a policy statement, the Base Numeric Nutrient Standards Implementation Guidance should have been referenced in the public comment notice.

MPA believes that one passage in the guidance document needs revision. On page 7 of Section 2.0, the Department has suggested for the first time that in later permit cycles permittees with lagoons not designed to actively remove nutrients will need to "implement best management practices identified during [the] optimization study." However, the statutory language imposes limitations on what the Department can dictate a permittee must do following the optimization study. Mont. Code Ann. § 75-5-313(9) requires little more than an optimization study to analyze how "to optimize nutrient reduction with existing infrastructure" with "cost-effective methods of reducing nutrient loading". It specifically notes that this be done "without substantial investment in new infrastructure." *Id.*

E. General Concerns

1. ***Protection of Downstream Uses***

The Department has refused to engage in a meaningful discussion about how it will analyze whether downstream uses are adequately protected when an applicant seeks a variance based upon water quality modeling. In the MPA letter to the Department in October, 2013, I indicated that MPA agreed with a recent comment submitted by the League of Cities and Towns, in which the League noted:

> The reference to "protection of downstream use" should be removed from the proposed documents or use language similar to the following: "dischargers shall only be responsible for the protection of downstream use to the first location of a non-point source loading". Without defining the extent a point source discharger is responsible for protection of downstream use and without recognition of non-point source contribution, the language is not acceptable.

Unfortunately, the lack of clarity has continued through the development of the rule package. In fact, in the guidance document, the Department states, "[a]ny reach-specific criteria developed for a receiving stream using a mechanistic or empirical model will also need to protect downstream beneficial uses. ... "How far downstream" is a consideration which will vary from case-to-case...." It is problematic to promulgate the rule packages without a better idea of the touchstones for DEQ's analysis because parties are left to their own devices to determine whether the answer is the point of the next discharge downstream or the Gulf of Mexico.

III. Conclusion

MPA wishes to express its gratitude the member of the Nutrient Working Group and the staff and officials in the Department of Environmental Quality. While we believe that more should be done before the rules are promulgated by the Board and DEQ, MPA believes the current drafts are much improved over past versions. This is the product of considerable effort

on the part of DEQ personnel and other stakeholders who are committed to optimal public policy on nutrient issues.

To the extent that MPA can provide additional information, analysis, or proposed language to the Board and the Department, we stand ready to do so.

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